

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers)	WC Docket No. 07-135
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Developing a Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link-Up)	WC Docket No. 03-109
)	
Universal Service Reform – Mobility Fund)	WT Docket No. 10-208

COMMENTS OF THE RLEC ETCS

September 26, 2012

The RLEC ETCs, Consolidated Telcom, Chippewa County Telephone Company, Hiawatha Communications, Ontonagon County Telephone Company, Triangle Communications, and Tri-County Telephone Association, are rate-of-return eligible telecommunications carriers (“ETCs”) that serve Tribal lands. The RLEC ETCs hereby file these comments in response to the Federal Communication Commission’s (“FCC” or “Commission”) August 27, 2012 Public Notice¹ seeking comment on the Petition for Reconsideration and Clarification of United States Telecom Association (“Petition”)² regarding the Tribal engagement requirements and the subsequent Office of Native Affairs and Policy (“ONAP”) *Further Guidance*.³ The RLEC ETCs support USTelecom’s position that the Commission’s *Further Guidance* violates the Administrative Procedure Act, contravenes the First Amendment, unduly burdens ETCs while offering little offsetting benefits for Tribes and was adopted without first obtaining the proper approval required by the Paperwork Reduction Act (“PRA”).⁴

As demonstrated below, it is imperative that the FCC reconsider and not impose these onerous burdens on rate-of-return carriers. At the very least, the Commission should reconsider the Tribal engagement requirement as it relates to RLEC ETCs, particularly in areas where rate-of-return ETCs serve uninhabited areas or other areas where the rate-of-return carrier does not intend to deploy broadband. In any event, the FCC should immediately make it clear that ETCs are not obligated to undertake any of the Tribal engagement requirements or *Further Guidance* until the FCC has released a Public Notice stating that PRA approval has been obtained.

¹ See Office of Native Affairs and Policy, Wireless Telecommunications Bureau, and Wireline Competition Bureau Seek Comment on the United States Telecom Association Petition for Reconsideration and Clarification of the Further Guidance Regarding the Tribal Government Engagement Obligation Provisions of the Connect America Fund, WC Docket No. 10-90 et al., Public Notice, DA 12-1405 (rel. August 27, 2012) (“*Public Notice*”).

² See United States Telecom Association Petition for Reconsideration and Clarification, WC Docket No. 10-90 et al. (filed Aug. 20, 2012) (“*USTelecom Petition*”).

³ See Office of Native Affairs and Policy, Wireless Telecommunications Bureau, and Wireline Competition Bureau Issue Further Guidance on Tribal Government Engagement Obligation Provisions of the Connect America Fund, Public Notice, DA 12-1165, WC Docket Nos. 10-90 et al. (July 19, 2012) (“*Further Guidance*”).

⁴ See Petition at p. 3.

I. No Justification Exists for Imposing the Tribal Engagement Requirements on Rate-of-Return Carriers

As observed in the Petition, the Tribal engagement requirements has as its chief objective that meaningful discussions occur between ETCs and Tribal communities regarding “deployment plans” of the ETCs in those communities and that such discussions would “be of no value if the ETC will not be receiving support for network deployment in a Tribal area.”⁵ The Petition instead urges the Commission to reconsider these requirements and apply them “only to ETCs that receive new high-cost support to fund deployment on Tribal lands (*i.e.*, Tribal Mobility Fund recipients and Connect America Fund (“CAF”) Phase II recipients serving Tribal lands). . . .”⁶ The Petition explains that such an ETC “applies for and receives funds to deploy facilities to serve Tribal lands.”⁷

Rate-of-return carriers are among the ETCs that do not apply for and receive funding to deploy facilities on Tribal lands and thus should not be subject to the Tribal engagement requirements. Rather than receiving CAF Phase II funding which also comes with build-out requirements, rate-of-return carriers instead receive high-cost funding which has been “capped and cut,” and comes with a broadband public interest standard that offers “a more flexible approach.”⁸ Specifically, the Commission determined that

Rate-of-return carriers that continue to receive HCLS or ICLS or that will receive new CAF funding in conjunction with the implementation of intercarrier compensation reform, as a condition of receiving support... must provide broadband service ... comparable to that available in residential terrestrial fixed broadband offerings in urban areas, upon reasonable request.⁹

⁵ Petition at p. 4.

⁶ *Id.*

⁷ *Id.*

⁸ *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (“*USF/ICC Transformation Order*”) at para. 206.

⁹ *Id.* (emphasis added).

The Commission observed that under this new standard, “rate-of-return carriers will not necessarily be required to build out to and serve the most expensive locations within their service area.”¹⁰ The Tribal lands engagement requirements and the *Further Guidance* take the opposite approach and presume that RLEC ETCs should initiate efforts to serve areas that could be wholly unreasonable to serve if they were not Tribal lands. Such an approach not only is contrary to the new “more flexible” approach, but also would also cause unnecessary confusion as any “meaningful” discussions with Tribal leaders regarding deployment would need to include determinations of whether or not it was “reasonable” to deploy the facilities.

Further, the significant burdens which accompany requiring small rural rate-of-return carriers to adhere to the Tribal engagement requirements far outweigh any benefits. The RLEC ETCs agree with the Petition’s assertion that the Commission failed to “‘adopt regulation only upon a reasoned determination that its benefits justify its costs,’” and “to ‘reduce unneeded burdens on the private sector.’”¹¹ Following the Tribal engagement requirements and recommendations in the *Further Guidance* may require an excessive burden on already limited resources. For example, most RLEC ETCs have a small staff with a limited number of “decision-makers,” each typically serving in several key roles. To have these key individuals spend an undetermined amount of time to lead and manage the Tribal outreach agenda places a significant burden on the small communications enterprise. This burden certainly is not justifiable in light of the unsubstantiated claim that “meaningful exchange can come only from those with the requisite authority to make decisions.”¹² Unlike larger ETCs that may have a cadre of executives and “decision-makers” at their disposal, small rate-of-return carriers do not have the additional support to develop business plans, marketing plans, and obtain rights-of-way and licenses on Tribal lands. As the Petition points out, following the *Further Guidance* “could literally require full-time attention from a senior leader and supporting team doing little else but traveling from Tribal community to Tribal community.”¹³ The burden of this obligation

¹⁰ *Id.* at para. 207.

¹¹ Petition at 11; See also International Reporting Requirements Order, 26 Rcd 7274, 7365.

¹² See *Further Guidance* at para. 10.

¹³ Petition at p. 13.

would be profound for a small ETC whose only “decision-maker” may be an elderly family member.

Accordingly, for the reasons stated above, the Commission should exempt rate-of-return carriers from the Tribal Engagement requirement.

II. At the Very Least, the Commission Should Provide For a *De Minimis* Exemption or a Streamlined Waiver Process

The RLEC ETCs strongly support expanding broadband to *all* inhabited rural areas including Tribal lands, but as explained in the examples below, some rural rate-of-return carriers serve Tribal lands that are entirely or mostly unpopulated. In these areas, complying with the Tribal engagement requirements and the *Further Guidance* would achieve no tangible broadband goals of the Commission, the Tribal government, or the ETC and instead would strain already limited financial and human resources.

A. Union River Telephone Company

Union River Telephone Company (“Union River”), a rural rate-of-return ETC located in Aurora, Maine, presents a strong case against imposing the Tribal engagement requirements and the *Further Guidance*. Union River serves a small section of Tribal land belonging to the Passamaquoddy Trust. This land has no permanent inhabitants but is used seasonally for blueberry harvests. The land contains blueberry fields, some clusters of cabins, and dense forest. Union River sees no business opportunity for extending broadband to this area, a feat that would cost at least \$150,000 and require extending the network several miles through difficult terrain (an “unreasonable request” by the standards set in the *USF/ICC Transformation Order*).¹⁴

B. Triangle Telephone Cooperative

Triangle Telephone Cooperative (“Triangle”) of Montana has a vastly different situation

¹⁴ Another example is an RLEC, Oxford West Telephone Company, that serves an 18-acre parcel of Passamaquoddy Trust land in Maine. Oxford West serves one customer on this land and 5/1 Mbps broadband is already available, rendering the need to engage with Tribal leaders unnecessary.

than Union River, yet these rural rate-of-return ETCs share the same concerns about the administrative and financial burdens imposed by the Tribal engagement requirements and the *Further Guidance*. Triangle serves two large Tribal areas (Rocky Boy's Reservation and Fort Belknap Reservation). Triangle has been actively engaging with Tribal leaders for years. Triangle knows firsthand how time-consuming and complicated Tribal engagement is for the purpose of securing rights-of-way and other necessary approvals required for deploying services on Tribal property. Rocky Boy's, being a self-governing Tribe over trust land, allowed Triangle the ability of going directly to the Tribal council to request right-of-way for this project. Triangle is already in the midst of deploying fiber-based broadband service to the Rocky Boy's Reservation and has learned from experience that the process takes years, with numerous hurdles along the way.

Triangle has plans to deploy fiber-based broadband in the northern portion of the Fort Belknap Reservation. Fort Belknap was created by treaty and land allocations were made to residents at that time. Those land allocations have been deeded equally to all heirs over the years wherein some land parcels can have over one hundred owners in joint tenancy. The Tribe requires at least half of the land owners, many living out of state, to give their approval before it will grant an easement. This has created a very difficult situation at best in obtaining sufficient rights-of-way to complete a project. Triangle anticipates an estimated cost of at least \$12 million (\$19,600/subscriber) and a minimum timeframe of 7-10 years to obtain the necessary permits and approvals to complete the southern portion of the reservation. The Fort Belknap Reservation has extremely rough terrain and a thinly spread population outside of a few main communities. Triangle already has determined that it is likely infeasible to deploy broadband in this area, yet the Commission's *Further Guidance* set false expectations that rate-of-return ETCs should prioritize Tribal broadband deployment over other, more economical investments.

C. Exemption or Expedited Waiver is Appropriate

To address these and similar situations, if the FCC does not exempt all rate-of-return carriers from the Tribal engagement requirement, the Commission should adopt a *de minimis* exemption for rural rate-of-return ETCs serving Tribal lands that are unpopulated, already served, or so sparsely populated that there would be no benefits to serving the area.

Alternatively, the Commission should adopt a streamlined waiver process for rate-of-return ETCs that would qualify for a *de minimis* exemption.

The Commission has allowed *de minimis* exemptions of other rules where the administrative or financial burdens would be significant for small companies. The Commission's rules grant a *de minimis* exemption from Universal Service Fund contributions and submission of the Telecommunications Reporting Worksheet (Form 499).¹⁵ The Commission also exempts cable providers with less than 1,000 subscribers from certain technical and recordkeeping rules.¹⁶ Alternatively, the Commission should adopt a streamlined waiver process which would allow carriers the opportunity to demonstrate that a waiver of the Tribal engagement requirement is warranted such as in situations where the Tribal land in its service area is unpopulated, already served, so sparsely populated that there would be no benefits to serving the area, or that it would be infeasible and constitute an unreasonable request to serve.

III. The FCC's Refusal to Obtain the Required PRA Approval Has Already Penalized Rate-of-Return Carriers

Pending resolution of the issues raised in the Petition, the Commission should immediately declare that the Tribal requirements and *Further Guidance* are not in effect until the FCC has issued a Public Notice stating that it has received the appropriate PRA approval. As explained in the Petition, the PRA requires Federal agencies to take certain steps to obtain approval by the Office of Management and Budget ("OMB") before requiring the collection of information.¹⁷ Absent PRA approval "[a]gencies may not penalize entities that fail to respond to Federal collections of information that do not display valid OMB control numbers."¹⁸ As noted in the Petition, OMB regulations define "information" very broadly as "any statement or

¹⁵ See 47 C.F.R. §54.708. "If a contributor's contribution to universal service in any given year is less than \$10,000..."

¹⁶ See 47 C.F.R. § 76.1700, "The operator of every cable television system having fewer than 1,000 subscribers is exempt from the public inspection requirements contained in § 76.1701 (political file); § 76.1715 (sponsorship identification); § 76.1702 (EEO records available for public inspection); § 76.1703 (commercial records for children's programming); §76.1704 (proof-of-performance test data); and § 76.1706 (signal leakage logs and repair records).

¹⁷ Petition at p. 14.

¹⁸ *Id.*

estimate of fact or opinion, regardless of form or format. . .”¹⁹ In the case of both the Tribal engagement requirements and the subsequent *Further Guidance*, the “information” that ETCs are required to obtain and report is in the context of a new FCC requirement found in 47 C.F.R. § 54.313(a)(9). This rule is among those that “contain information collection requirements that are not effective until approved by [OMB].”²⁰ The FCC has not requested or received OMB approval for this reporting requirement or for the *Further Guidance*.

According to a recent *ex parte*, however, ONAP has stated that the Tribal engagement requirement is separate from the reporting requirement and does not require OMB approval.²¹ ONAP has warned that ETCs must take action now to comply with all of the five items listed in 47 C.F.R. § 54.313(a)(9) prior to the end of 2012, so they will have the information they need to provide in the ETC annual report which is due by July 1, 2013.²² In taking this position, ONAP assumes that the PRA approval process will be obtained prior to July 1, 2013 with no modifications made to the reporting requirements. The threat of penalty if ETCs do not begin complying now not only is contrary to the statutory requirement but has already begun to burden small rural ETCs as they have had to rush to meet such a short deadline.

The RLEC ETCs respectfully disagree with ONAP’s position and support the evidence set forth in the Petition that neither the Tribal engagement requirements nor the *Further Guidance* are legally enforceable, and the “effective date for any [T]ribal engagement rules must be prospective, and any reporting associated with those rules should not be required until at least a year following the effective date of any [T]ribal engagement rules.”²³ At the very least, the RLEC ETCs urge the FCC to immediately issue a ruling clarifying that the Tribal engagement requirements do not become effective until after the Commission issues a Public Notice that the reporting requirements have received OMB approval.

¹⁹ *Id.* at p. 14-15 & n.43.

²⁰ See 76 FR 73830 (2011). The Federal Register Notice further states that the FCC will “publish a document in the Federal Register announcing the effective date for those sections.”

²¹ See Letter from John Kuykendall, Vice President, John Staurulakis, Inc. to Marlene H. Dortch, Secretary, FCC, *ex parte* presentation in WC Docket No. 10-90 et al. filed Sep. 10, 2012 (“*ex parte*”).

²² *Id.*

²³ See Petition at p. 15 & n.45.

IV. Flexibility Should be Allowed to Determine the Best Method for Engaging Tribal Leaders

It is not only imperative that the OMB process be given a full hearing, but that the Commission takes steps now to adopt less burdensome alternatives which will accomplish the FCC's goals in a more meaningful manner. For example, in lieu of the suggestions included in the *Further Guidance*, RLEC ETCs should be permitted to engage with Tribal leadership in a manner that best meets its business capabilities and corresponds with the population and size of the Tribal lands. This would give flexibility so that ETCs could engage via video conferencing or other less expensive means rather than traveling to meet with Tribal leaders in person. ETCs with small Tribal geographic areas and populations could have reduced or more streamlined requirements than ETCs serving larger areas and populations. ETCs, particularly rate-of-return carriers, should be able to determine the best method for engaging Tribal leadership based on the individual company's intention to deploy broadband to the Tribal lands and its resources.

Moreover, in some places, the RLEC ETC is already serving Tribal lands within its service area and has established a relationship with the Tribal community and therefore may easily meet its engagement obligation. In other places, the Tribal government may not wish to engage with the ETC or may have pre-existing plans to deploy broadband with another carrier. It should be up to the discretion of the carrier to determine when it has exercised sufficient due diligence in attempting to comply with the Tribal engagement rule. Rate-of-return ETCs should not be forced to expend disproportionate resources attempting to engage with Tribal governments that may not be interested in engaging with the ETC.

V. Conclusion

For the reasons discussed above, the RLEC ETCs respectfully request that the Commission reconsider and clarify the Tribal Engagement requirement and *Further Guidance*.

Respectfully Submitted,

September 26, 2012

THE RLEC ETCS

Consolidated Telcom

By: /s/ Paul Schuetzler

Paul Schuetzler

Consolidated Telcom

P.O. Box 1408

Dickinson, ND 58601

**Hiawatha Communications Incorporated
(Hiawatha Telephone Company, Chippewa County
Telephone Company, Ontonagon County
Telephone Company)**

By: /s/ James P. Brogan III

James Brogan III

Hiawatha Communications Incorporated

108 West Superior Street

Munising, Michigan 49862

Triangle Communications

By: /s/ Richard Stevens

Richard Stevens

Triangle Communications

P.O. Box 2330

Havre, Montana 59501

Tri-County Telephone Association

By: /s/ Chris Davidson

Chris Davidson

Tri-County Telephone Association

P.O. Box 671

Basin, Wyoming 82410